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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: [redacted] Office: Nebraska Service Center Date: MAY 16 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

As stated in our previous decision, on the petition, the petitioner checked the classification "alien of extraordinary ability." The accompanying letter from counsel indicated that it was in reference to:

> I-140 - Immigrant Visa Petition and Request for ["]National Interest Waiver" by [the petitioner] as an individual of "Extraordinary Ability" in athletics (Employment-Based Preference Category: EB-1)

The above statement is internally inconsistent. While an alien of extraordinary ability under Section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A) is a first preference (EB-1) classification, it requires no labor certification. As such, a waiver of the labor certification in the national interest is irrelevant. The brief then goes on to discuss the criteria for aliens of exceptional ability, a second preference (EB-2) classification under Section 203(b)(2) of the Act. Second preference classification normally requires a labor certification, although that requirement may be waived in the national interest.

Relying on the classification indicated on the petition and the "EB-1" language in counsel's brief, the director sent a request for additional documentation regarding the extraordinary ability classification. In response, counsel did not contradict the director. Rather, counsel asserted that the petitioner met some of the criteria relating to the EB-1 classification. Thus, the director adjudicated the petition under Section 203(b)(1)(A) of the Act and determined that the petitioner had not demonstrated sustained national or international acclaim. On appeal, counsel asserted that the petitioner's qualifications make him eligible for the national interest waiver, a waiver relevant only to aliens of exceptional ability. In our previous decision, this office found that the director properly adjudicated the petition as one seeking classification as an alien of extraordinary ability. We then evaluated the evidence under the criteria set forth for aliens of extraordinary ability, and upheld the director's decision.

On motion, counsel does not challenge this office's conclusion that the petitioner is not an alien of extraordinary ability pursuant to Section 203(b)(1)(A) of the Act. Instead, counsel asserts that the petition was submitted with "an error in that the wrong box was checked for petition type." Counsel asserts that this error was an "inadvertent deficiency."

The only issue on motion is whether this office correctly determined that the director did not err in adjudicating the petition as one seeking to classify the petitioner as an alien of extraordinary ability. We note that had we determined that the director erred, we would have needed to remand the matter back to the director for a decision on the lesser classification as this office does not have the jurisdiction to issue a decision of first impression.

Counsel's assertion that the petition should be reconsidered as one seeking to classify the petitioner as an alien of exceptional ability is not persuasive. As stated above, not only was the

box for extraordinary ability checked, counsel's initial brief referenced "Extraordinary Ability" and "EB-1" in addition to the "National Interest Waiver." We acknowledge that the initial documentation was ambiguous, and could be have been interpreted at that stage as requesting classification as an alien of exceptional ability. Any ambiguity, however, could have easily been remedied in response to the director's request for additional documentation, which referenced only the requirements for aliens of extraordinary ability. Thus, at that time, the director clearly indicated his intention to adjudicate the petition under Section 203(b)(1)(A) of the Act. Instead of asserting at that time that the wrong box had been checked, counsel instead argued that the petitioner "has proved himself as an extraordinary coach." By not challenging the director's use of the criteria for aliens of extraordinary ability and using the term "extraordinary" in his response, counsel essentially accepted the director's intention to adjudicate the petition pursuant to Section 203(b)(1)(A) of the Act. Only on appeal did counsel raise the issue of the national interest waiver again.

Once the director had issued a decision it was too late to request that the petition be adjudicated under a lesser classification. Given counsel's failure to challenge the director's clearly expressed intention to adjudicate the petition under Section 203(b)(1)(A) in response to the director's request for additional documentation, we cannot conclude that the director's final decision was reversible error. Thus, counsel has not established that our previous decision upholding the director's decision was in error.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of September 17, 2002 is affirmed. The petition is denied.